the offence and decided to terminate his service. One cannot really find fault with this procedure along the line, at least, of logical sequence and consequence. This dismissal under Regulation 35 is a procedural right which spells out the guideline and path that the committee must take and abide. Regulation 48, notwithstanding any other preceding regulations, empowers Felda an additional right independently to terminate an officer by giving him 3 months' notice or 3 months' pay in lieu of notice without assigning any reason for doing so. This exercise of the right under Regulation 48 is not *ultra vires* to Article 8 of the Federal Constitution because it has not breached the principle of natural justice because he was given a chance to make his representation to exculpate himself from the blame or alleged wrong or misconduct as underlined in the audit report. He chose to admit his guilt and asked for forgiveness. His reply can be treated as some form of representation or can be said to be waiving his right of defence or right of representation. Hence there is no doubt whatsoever as to his guilt as admitted by him. The Felda Chairman has rightly dispensed with holding an inquiry by committee to establish the guilt or innocence of such act allegedly committed by the plaintiff. With this factual backdrop of the circumstances as described above it is definitely wrong to say that the plaintiff was not given a right to be heard thereby running foul with the principle of natural justice. As to the other component of natural justice on the question of bias, discrimination there is not a simple *iota* of evidence to say or suggest otherwise.

In the light of the above I dismiss the plaintiff's application for a declaratory order that the plaintiff's termination of service with Felda is null and void and/or invalid with costs and hold that all due process and procedure of termination of service of an employee of Felda have been duly complied with.

SI KHIONG INDUSTRIES SDN. BHD.

v.

LIAU SHU CHAU (TRADING AS SYARIKAT MAJU JAYA AGENCY)

HIGH COURT, TAWAU
TUAN IAN H.C. CHIN JC.
[SUIT NO. T 276 OF 1986]
1 MARCH 1993

TORT: Trespass & conversion - Whether committed - Trucks subject-matter of sale between plaintiffs and defendant - Refinancing of purchase - Arrangement with bank by way of bills discounting - Bills of exchange executed by plaintiffs as drawers and defendant as acceptors - Bank both holder and payee - Delivery up of executed blank transfer forms, registration cards and bills of exchange to bank - Whether trucks meant to be pledged to bank - Plaintiffs endorsers of bills of exchange - Default by defendant of the bills - Possession taken of trucks by plaintiffs before amount due under bills paid to bank - Whether plaintiffs entitled to do so - Whether plaintiffs surety for the payment to the bank - Whether entitled to securities deposited with bank - Section 94, Contracts Act 1950 - Common law - Counterclaim - Whether properly brought - Pledge of trucks - Bailment - Defendant bailor - Whether defendant had right to sue - Sections 125, 131 & 133, Contracts Act 1950 - Trespass & conversion - Repossession and sale of trucks by plaintiffs - No prior demand made by defendant for delivery up of trucks - Whether prior demand relevant to trespass and conversion.

BAILMENT: Removal of trucks - Trespass and conversion - Whether bailor had right to sue.

The defendant claimed against the plaintiffs for damages for trespass and conversion in respect of two logging trucks which the defendant alleged the plaintiffs had wrongfully taken and removed from the defendant's possession in January 1985. The trial was solely in respect of this counterclaim.

In 1983, the plaintiffs sold two trucks to the defendant at a total price of RM290,000. A certain sum for the balance was outstanding for sometime. The defendant also owed the related companies of the plaintiffs some other sums. The plaintiffs arranged with a bank for a sum of RM110,000 to refinance the purchase of the trucks by way of bills discounting so that the plaintiffs and its related companies could be paid the debt owing by the defendant. Twelve

bills of exchange were prepared, and executed by the plaintiffs as drawers and the defendant as accepters. The bank was both the holder and payee. The bills were accepted by the defendant, who also executed blank transfer forms of the trucks. The bills, the registration cards and transfer forms were given to the bank. The plaintiffs were credited with a sum of RM110,000, and the defendant given credit for that sum by the plaintiffs, wiping out the debts of the defendant. On the defendants defaulting in payment of the bills, the bank demanded payment. The plaintiffs wrote to the defendants, stating that unless there was settlement within 7 days of all outstanding payments, they would arrange for the release of the registration cards and executed transfer to them, and proceed to repossess the vehicles and thereafter cause a summons to be issued against the defendants to recover all sums due to them.

The defendant made out a post-dated cheque in purported payment of some of the bills. The cheques were dishonoured. The plaintiffs repossessed the trucks. They paid off the bank. They were then delivered the registration cards and transfer forms of the truck. They sold the trucks, and transferred them to the purchaser.

Held:

[1] In the circumstances of the case, there was a pledge of the two trucks to the bank on the defendant executing and delivering to the plaintiffs for transmission to the bank the registration cards and the blank forms together with the bills of exchange.

[2] The plaintiffs had not committed any trespass or conversion, as they had the right to take possession of the trucks and to dispose of them. Either under the common law or s. 94 of the Contracts Act 1950, they had a right in the circumstances of the case to take possession of the trucks even though they had taken possession before they had paid the bank the amount due under the bills of exchange. They had the right to seize the said trucks for the purpose of preserving the trucks as a prelude to the realization of the security by the sale of the trucks after they had paid the money.

[3] A surety is not without rights at all even though he has not yet discharged the debt. According to s. 94 of the Contracts Act 1950, a surety is entitled to the benefit of the security from the time the contract of suretyship is entered into. Under common law too, a surety has certain rights, such as the right to a declaration that he be discharged and exonerated from liability, and the right to consequential executory relief under O. 29 of the Rules of the High Court 1980, for the preservation of property.

[4] However, there was no merit in the plaintiffs' contention that the defendant had no right to sue. Where there is a pledge with the pledgor retaining possession within the meaning of s. 125 read with s. 131 of the Contracts Act, as in this case, either the bailor, who has the right to immediate possession, or the bailee may sue to wrongdoer in trespass. In any event, s. 133 of the Contracts Act allows a bailor, of which the defendant was one, to sue.

[5] Furthermore, the counterclaim was in order in so far as the claim for trespass was concerned even though there was no prior demand for delivery up of the trucks. The counterclaim for conversion must, however, fail. An action for trespass is not shackled with any prior condition of demand for delivery up, as there is in conversion.

[Counterclaim dismissed with costs to be taxed].

Cases referred to:

Duncan, Fox & Co. v. North and South Wales Bank [1880] 1 App Cas. 1 ***(refd)***

Re Howe, ex p Brett [1871] 6 Ch App 838 ***(refd)***

Dixon v. Steel [1901] 2 Ch 602 ***(refd)***

Ascherson v. Tredeger Dry Dock and Wharf Company Ltd. [1909] 2 Ch. 401 ***(refd)***

Watt v. Mortlock [1964] 1 Ch. 84 ***(refd)***

Thomas v. Nottingham Incorporated Football Club Ltd. [1972] 1 Ch. 596 ***(refd)***

Abdul Muthalib bin Hassan v. Maimoon Bt Haji Abd. Wahid [1992] 1 CLJ 88 ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 94, 125, 131, 133
Rules of the High Court 1980, O. 29

Other sources referred to:

Halsbury's Laws of England, 4th. Edn., Vol. 45, para 1493, 1497
Snell's Equity, 29th Edn., p. 473
Zamir on **The Declaratory Judgment,** p. 318

For the plaintiffs - Edwin Tsen (Lim Chin Wu with him); M/s. Chong & Pang
For the defendant - Cecil Robertson; M/s. C.I. Robertson

JUDGMENT

Ian H.C. Chin JC:

History

The plaintiffs sue the defendant for a sum of RM46,771.03 under various bills of exchange. At the outset of the trial the defendant consented to judgment being entered against him for the sum of RM45,271.03 with statutory interest and costs. This leaves a sum of RM1,500 which the parties have agreed to resolve themselves and which claim hinges on the outcome of the counterclaim of the defendant. The trial herein was therefore solely in respect of the counterclaim of the defendant.

Counterclaim

The defendant claims against the plaintiffs for damages for trespass and conversion in respect of two logging trucks ("the said trucks") which the defendant alleges that the plaintiffs wrongfully took and removed from the defendant's possession in January 1985.

Defence to Counterclaim

The parties agreed that the pleadings will not be followed strictly to determine the issues with the result that the issues as argued by the plaintiffs' Counsel in his written submission are regarded as being pleaded whatever the actual pleadings.

Agreed Facts of the Case

The facts are gleaned from the agreed statement of facts and from the undisputed evidence adduced in Court.

The plaintiffs in 1983 sold the defendant the said trucks at the total price of RM290,000 of which certain sums for the balance of the purchase price was outstanding for sometime. The defendant also owed the related companies of the plaintiffs some other sums. In January 1985 the plaintiffs arranged with a bank for a sum of RM110,000 to refinance the purchase of the said trucks by way of bills discounting so that the plaintiffs and its related companies can be paid the debts owing by the defendant. For the purpose the plaintiffs prepared 12 Bills of Exchange ("the said bills") worth a total of RM110,000, which were executed by the plaintiffs as drawers and the defendant as acceptors. The bank concerned was both the holder and payee. The said bills were accepted by the defendant on 24 January 1985 and they fell due respectively every consecutive month thereafter. The defendant also executed the transfer forms of the said trucks. The said bills, the registration cards and transfer forms of the said trucks were on 24 January 1985 given to the bank. The bank thereafter credited the plaintiffs with a sum of RM110,000 and the plaintiffs in turn gave credit to the defendant for the said sum wiping out the said debts of the defendant. The defendant defaulted in payment of all the said bills. The bank demanded payment from the defendant (see Exhibits D154). The plaintiffs wrote to the defendant on 4 December 1985 (Exhibit P15) with regards to the said bills in this manner:

> RE: BILLS COVERING 2 UNITS MERCEDES BENZ LK262 DISCOUNTED WITH THE STANDARD CHARTERED BANK.
>
> You have failed to make payment of the above mentioned Bills discounted with The Standard Chartered Bank, Tawau. The facilities granted was secured by the deposit of the registration cards and executed transfers in respect of the two vehicles with the said Bank and with recourse to us.
>
> TAKE NOTICE that unless you settle all outstanding instalments together with all outstanding discounting interest and overdue interest with the said Bank within seven (7) days from the sate hereof, we shall have no alternative but to arrange for payment to the Bank, obtain the release of the relevant registration cards and executed transfers to us and proceed forthwith to repossess the vehicles and thereafter cause a summons to be issued against you to recover all sums due to us.

The defendant on 14 December 1985 wrote to the plaintiffs (Exhibit P16) and forwarded a post-dated cheque for RM42,489.56 in purported payment of 4 overdue bills. The said cheque when presented for payment on the 5 January 1986 was dishonoured. The plaintiffs thereafter went about repossessing the said trucks and this was accomplished by 10 January 1986. On 18 March 1986 the plaintiffs paid the bank all the sums due on the said bills together with interests. The bank on 4 April 1986 delivered to the plaintiffs the registration cards and transfer forms of the said trucks. The plaintiffs sold the said trucks in July 1987 for RM90,000 and the said trucks were accordingly transferred to the purchaser.

The Issues & Conclusions

From the submissions of Counsel for the parties I gather the issues to be as follows:

(1) Was there a pledge of the said two trucks to the bank when the defendant executed and delivered to the plaintiffs for transmission to the bank the registration cards of the trucks and the blank transfer forms together with the said bills of exchange;
(2) Were the plaintiffs entitled to take possession of the said trucks before the plaintiffs paid the bank in full the amount due under the said bills of exchange;
(3) Can the defendant sue for trespass and conversion when the trucks have been pledged to the bank and before the defendant had paid the amount due on the said bills;
(4) Is a demand for the return of the trucks a pre-condition for a right of action to accrue to the defendant; and
(5) Was there a demand for the return of the said trucks.

The Pledge.

The issue of whether there was a pledge will be resolved by the answers to the following questions -

(1) why did the defendant execute the blank vehicle transfer forms? and;
(2) why did he hand them over together with the registration cards of the said trucks and the said bills to the plaintiffs for transmission to the bank?

The defendant's explanations, if they can be called that, are these:

> ... I was also asked to sign other documents, two blank vehicle transfer forms as they were required by the bank. I handed Exhibit P6s and the 2 blank transfer forms to the plaintiffs .... (See p. 8 of the notes of proceedings, examination-in-chief);
>
> ... I executed the Bills of Exchange and the motor vehicles transfer form in order to raise finance from Standard Chartered Bank. I was aware these documents were to be deposited with Standard Chartered Bank ... (See p. 13 of the notes of proceedings, cross-examination);
>
> ... I did ask him why I have to sign the blank transfer forms. He told me that was required by the bank I signed them. I am aware of my obligation to pay the bills when they fell due. I do not know what would happen if I do not pay ... (See p. 14 of the Notes of Proceedings, cross-examination).

That was all that the defendant said with regards to the delivery of the registration cards of the said trucks and of the executed blank vehicle transfer forms. There was never any denial that the said exercise was to place the said trucks at the disposal of the bank if the money due under the said bills are not paid. The plaintiffs through PW1 adduced evidence that the mechanics of the refinancing was explained to the defendant but unfortunately there was no evidence as to whether the nature of a pledge was explained to the defendant. As far as the bank is concerned its position with regards to the said documents is stated in its letter of 22 November 1985 to the plaintiffs (Exhibit P11):

> ... We understand that you intend to repossess these vehicles and as the release of the registration cards and pre-signed transfer forms constitutes a release of the security financed by us, we must request you to settle the outstanding items in this name ...

It is my opinion that the circumstances attending to the execution of the said blank transfer forms and their delivery together with the registration cards of the said trucks and the bills of exchange can only mean that the said trucks were meant to be pledged to the bank. There cannot be any other reason for the said exercise and none was advanced by Counsel for the defendant. The said trucks were, by the deposit of the said transfer forms and registration cards, pledged to the bank.

Right to Possession

Counsel for the defendant contended that the plaintiffs have no right to take possession of the said trucks till after they have paid the bank the amount due under the said bills of exchange. The case of *Duncan, Fox & Co. v. North and South Wales Bank* [1880] 1 App Cas. 1 was cited as supporting the said proposition of law. That case actually decides that an indorser of a bill of exchange is a surety for the payment to the holder and, having paid it, is entitled to the benefit of any securities deposited with the holder to cover it. It was held in *Re Howe, ex p Brett* [1871] 6 Ch App 838, per Mellish LJ, that a surety is not entitled to the securities which the principal creditor holds until he pays the debt. Counsel for the defendant submitted that since the possession of the trucks were taken by the plaintiffs in January 1986 before the plaintiffs had paid the bank in March 1986, the plaintiffs had committed trespass and

conversion. On the other hand the plaintiffs Counsel argued that:

(1) the plaintiffs had the right to seize the said trucks because the plaintiffs were "in the position as a surety, having paid off the Bank, they were entitled against the Bank to have the benefit of the securities deposited";
(2) the rights of the bank as pledgee of the trucks, including the right to sell, passed to the plaintiffs; and
(3) the plaintiffs were under s. 94 of the Contracts Act 1950, entitled to possession before the discharge of the obligations as a surety.

The plaintiffs' arguments (1) and (2) are evidently self-defeating because both arguments are grounded on the premises that the plaintiffs had paid the bank before the plaintiffs took possession. But since there is no dispute that the plaintiffs took possession of the said trucks before they paid the bank, the arguments are therefore not sustainable because the plaintiffs right to the security can only arise after they have paid the bank. See *Re Howe, ex p Brett* case.

As regards the argument (3), there was no elaboration from Counsel for the plaintiffs and there was no address on the same by Counsel for the defendant. The entitlement of a surety to the benefit of the security is provided for in s. 94 of the Contracts Act 1950:

> 94. A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses, or, without the consent of the surety, parts with the security, the surety is discharged to the extent of the value of the security.

It would appear from the said section that a surety is not without any rights at all even though he had not yet discharged the debt since he is entitled, according to the said enactment, to the benefit of the security from the time the contract of suretyship is entered into. It was said in the case of *Dixon v. Steel* [1901] 2 Ch 602, per Cozens-Hardy J:

> The right of a surety against the security given to the creditor by the principal debtor arises at the time of his becoming surety, and does not arise merely if, and when, he discharges the obligation of the principal debtor. It certainly is not the law that a surety has no rights until he pays the debt due from his principal

It was held in that case that the surety though she had not satisfied the amount due under a mortgage of which she was a surety was nevertheless entitled to commence an action for a declaration that a certain sum of money must be applied towards the reduction of the debt due under the said mortgage so as to reduce the liability of the surety under the said mortgage. The nature of this right has been described in **Snell's Equity,** 29th Edn., at p. 473, thus:

> 1. *Quia timet* relief
>
> (a) Principle. The surety has an equitable right to compel the principal debtor to pay the debt and so relieve the surety from the necessity of paying it out of his own pocket. It is in the nature of *quia timet*, and is based on the principle that it is "unreasonable that a man should always have such a cloud hang over him," so that he ought to be entitled to remove it. It is therefore immaterial that the creditor has refused to sue, or even that he had made no demand. A *fortiori*, the action lies where the principal debtor threatens to commit a breach of the obligations which the surety has guaranteed; and an order may be made even though the principal debtor is without funds. But the action will not lie if the debt is not an actual accrued and definite debt, or if on its true construction the guarantee precludes action before the creditor demands payment.
>
> (b) Where the action lies, the Court will grant the surety a declaration that he is entitled to be discharged and exonerated from liability, and will order the principal debtor to pay the debt, with liberty to apply as to the mode of enforcement if he does not.

Other cases illustrating this right are *Ascherson v. Tredegar Dry Dock and Wharf Company Ltd* [1909] 2 Ch. 401; *Watt v. Mortlock* [1964] 1 Ch. 84; and *Thomas v. Nottingham Incorporated Football Club Ltd* [1972] 1 Ch. 596. In all those cases the Court granted declarations that the principal debtor pay the debt to the creditor with liberty to apply in the event of non-payment even though the surety had not satisfied the debt yet. If such declaratory judgment is disregarded by a defendant, the plaintiff could apply for executory relief. See **Zamir on**

The Declaratory Judgment, at p. 318. The executory relief may, I am of the opinion, include injunctions and orders for the interim preservation of property under O. 29 of the RHC 1980 followed by the sale of the property concerned with the consequential orders with regards to the disposal of the proceeds of the sale to enforce compliance with the declaratory judgment. If there had been in this case such an application for a declaration and the consequential application for the preservation of the said trucks, the Court would have been entitled to and would have made a declaration that the defendants do pay the bank the amount due on the said bills with liberty to apply in the event that the defendants refuse to pay and would have, upon an application and upon the failure of the defendants to pay the bank, ordered the said trucks to be seized and sold and the proceeds be made available to satisfy the debt due to the bank.

This leads me to consider whether the nature of this right can be extended to include taking possession by the plaintiffs of the said trucks that were pledged by the defendant to the bank as a prelude to their sales in anticipation of the plaintiffs having to settle the debt due from the defendant to the bank. Since the plaintiffs are under s. 94 of the Contracts Act "entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered", such "entitlement" must, in certain circumstances, necessarily include the right to take measures, in cases where the security is movable and depreciable, to protect by taking into custody the security so that the benefit of the security is not rendered less beneficial or illusory by it being continued to be used or wasted by a principal debtor who does not bother to pay a single cent of his debt and which debt the creditor had evinced the intention to look to the surety for payment. The circumstances that give rise to the right of the plaintiffs to take possession of the said trucks are these:

(1) the said trucks, which constitute the security, could have been seized and sold by the bank towards satisfaction of the debt due to the bank by the defendant but the bank did not do so;
(2) the seizure of the said trucks were made after the plaintiffs had demanded that the defendant settled the debt due to the bank and after the plaintiffs had given notice that they intended to seize the said trucks;
(3) the sale of the said trucks were intended by the plaintiffs to and could only be carried out after the plaintiffs had satisfied the debt owing by the defendant to the bank;
(4) the sale of the said trucks was for the purpose of indemnifying the plaintiffs after the plaintiffs had satisfied the debt due from the defendant to the bank;
(5) the non-seizure of the said trucks would have not only resulted in the defendant being unjustly enriched by the defendant's continued use of the said trucks while not paying a single cent of the debt owed by him to the bank but would also have resulted in the security being deprecated with consequential losses to the plaintiffs; and
(6) the bank had tacitly agreed or in any event did not object to the seizure of the said trucks by the plaintiffs.

I am therefore of the opinion that the plaintiffs either under the common law or under s. 94 of the Contracts Act and in the circumstances of this case had the right to seize the said trucks and they did not commit any trespass. Neither was conversion committed because the plaintiffs after paying off the bank were entitled to dispose off the said trucks. In the premises the defendant's counterclaim is dismissed with costs to be taxed.

This conclusion of mine appears to conflict with that of *Duncan, Fox & Co's* case and *Re-Howe, ex p Brett's* case but is really not so. Those cases decide that a surety, after having paid the debt, is entitled to the benefit of the security and the entitlement there refers to a right to realize the security. I am not deciding here that the plaintiffs have a right to realize the security before the plaintiffs paid the bank but only that the plaintiffs, in the circumstances existing in this case, have a right to seize the said trucks for the purpose of preserving the said trucks as a prelude to the realization of the security by the sale of the said trucks after the plaintiffs have paid the bank.

If I am wrong in my conclusion that the plaintiffs had the right to take possession of the said trucks then there should be judgment for the defendant for damages for trespass because the other grounds of defence to the counter-claim are not sustainable and I will now set them out and give my reasons for so deciding.

Who Can Sue

It was argued by Counsel for the plaintiffs that only the bank can sue for trespass and

conversion. The facts of this case show that there was a pledge with the pledgor retaining possession within the meaning of ss. 125 read with 131 of the Contracts Act, which sections are reproduced here:

> 125. The bailment of goods as security for payment of a debt or performance of a promise is called "pledge". The bailor is in this called the "pawnor". The bailee is called the "pawnee".
>
> 131. A person who is in possession of any goods, or of any bill of lading, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate, or warrant or order for delivery, or any other document of title to goods, may make a valid pledge of the goods or documents ...

In the case of a bailment of goods which does not exclude the right of the bailor to immediate possession, which is the case here, either the bailor or the bailee may sue a wrongdoer in trespass. See **Halsbury's Laws of England,** 4th. Edn., Vol. 45, para. 1497. In any event s. 133 of the Contracts Act 1950 allows a bailor, of which the defendant is one, to sue. The said section reads:

> 133. If a third person wrongfully deprives the bailee of the use of possession of the goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made; and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury.

There is therefore no merit in the plaintiffs contention that the defendant has no right to sue.

Demand Before Action

It was next argued by Counsel for the plaintiffs that a precondition for the defendant's counterclaim has not been satisfied, which is that there must be a demand by him for the return of the said trucks and there was none in this case. The case of *Abdul Muthalib bin Hassan v. Maimoon Bt Haji Abd. Wahid* [l992] 1 CLJ 88 was cited as supporting the said proposition of law. That case decides that there must be demand for the delivery up of the goods before one can sue for detinue or conversion. Of course, demand is irrelevant where an action is founded on trespass. As for the distinction between trespass and conversion and the remedies available, **Halsbury's Laws of England,** 4th Edn., Vol 45, para 1493, has this to say:

> Trespass and conversion are both forms of wrongful interference with goods. They are analogous torts, each of them arising out of an unlawful dealing with personal chattels; in neither action can the plaintiff succeed, unless he had, when the unlawful act was committed, the possession, or a right to the immediate possession, of the chattels unlawfully dealt with. The gist of an action of trespass is an unlawful taking or removing or damaging of a personal chattel; the gist of an action for conversion is the wrongful conversion of a personal chattel to the defendant's use or to the use of some third person, the failure to deliver up the chattel when demanded, or the destroying or changing of the quality of the chattel. An act of trespass may be complete by an unlawful taking without any conversion, and an act may amount to conversion where there is no unlawful taking. An act of trespass may be accompanied or followed by a conversion, in which case the owner of the chattel may sue in trespass or conversion, or in both, or he may sue in trespass alone and give evidence of the conversion in aggravation of the damages. In an action of trespass the plaintiff may recover exemplary, aggravated or only nominal damages. The same is true of an action for conversion, but normally the damages recoverable for conversion are the value of the goods or of the plaintiff's interest in them. As in conversion, the person entitled to possession may have the right to elect whether to sue in tort for trespass or bring an action for money had and received.

Therefore, since the defendant's counterclaim is founded on trespass as well as on conversion, the counterclaim is in order in so far as the claim for trespass is concerned even though there was no prior demand for delivery up of the said trucks because an action for trespass is not shackled with any prior condition of demand for delivery up. The plaintiffs' contention also fails but fails only in respect of the counterclaim for trespass. As for the counterclaim for conversion I agree with Counsel for the plaintiffs that there ought to have been a demand by the defendant for the return of the said trucks and I find as a fact that there was none in this case and this part of the counterclaim must therefore fail apart for the reason, which I have stated earlier on, that there was no conversion.

Damages

If judgment for the defendant for damages for trespass should have been given because I am wrong in holding that the plaintiffs are entitled to take possession of the said trucks before satisfying the obligations of the principal debtor,

then the damages recoverable by the defendant are as follows.

Counsel for the defendant argued that the defendant is entitled to the return of the said trucks or the sum of RM220,000 being their value or alternatively the return of the said trucks and damages of RM20,017.75 per month commencing January 1986 and damages for trespass and conversion.

Return of the said trucks to the defendant is out of the question because the plaintiffs had after they had paid the bank on 18 March 1986 lawfully, as surety entitled to the benefit of the security, disposed of the said trucks in July 1987. Consideration of the damages suffered by the defendant consequent upon the trespass should therefore be confined to the period between 10 January 1986 (when the plaintiffs seized the said trucks) and 18 March 1986 (when the plaintiffs became entitled to seize the said trucks after paying the bank); a period of, the parties agreed to regard as, two months. The defendant claimed a sum of RM20,017.75 per month. This figure, which is alleged to be profit which the said trucks would have earned per month if they had not been seized, is derived from taking the average of all the earnings contributed by the said trucks in 1983, 1984, 1985 and 1986 by way of hauling the logs so that the logs can be sold. The defendant produced invoices and custom export declarations to support the sales volume and prices of timber which were hauled by the said trucks for the years 1983 to 1986. The defendant gave oral evidence, unsupported by any documents, as to how the profit was calculated by making allowances for various disbursements. Counsel for the plaintiffs challenged the alleged profit by asking the defendant to explain if there was such a profit as alleged why the same cannot be supported by the relevant income tax assessments. The defendant could not explain. The defendant had alleged the following profits for the various years:

1983	...	RM 438,946.64
1984	...	RM 773,547.98
1985	...	RM 76,942.86
1986	...	RM 209,595.83
	Total	RM1,499,033.31

The Notices of Assessment (Exhibits D129, D130, D131 and D132) produced by the defendant show the following gross income earned by the defendant for the years concerned:

Year of Assessment 1984 (i.e. for 1983) ...	RM142,802.00
Year of Assessment 1985 (i.e. for 1984) ...	RM138,601.00
Year of Assessment 1986 (i.e. for 1985) ...	RM140,000.00
Year of Assessment 1987 (i.e. for 1986) ...	RM140,000.00
Total	RM561,403.00

Though I am of the opinion that the defendant is not a truthful witness as regards his earnings I am still prepared to accept the fact that the said trucks would have made some earnings if the said trucks were allowed to be used by the defendants for two months. If a gross alleged income of RM1,499,033.31 only produce an average monthly income of RM20,107.75 then a gross income tax declared income of RM561,403.00 would produce (20,107.75 divided by 1,499,033.31 multiplied by 561,403.00) a profit of RM7,530.55. For two months the said trucks could have probably earned RM15,061.10. But there is the evidence of the defendant (see p. 9 of the Notes of Proceedings) that one of the said trucks was at the relevant time in a workshop and therefore out of commission. Only one of the said trucks could be used to earn an income. Thus, the probable income should be half of RM15,061.10. Therefore, if I am wrong in my ruling that the plaintiffs had not committed trespass and conversion I would enter judgment for the defendant's counterclaim for the sum of RM7,530.55 with costs at the scale of the Subordinate Courts.

Judgment.

In the premises and to recap, the defendant's counterclaim is dismissed with costs to be taxed.

Reported by Shamsiah Begum Subhan